

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for Reinstatement)
of Revoked Certificate of:)

ZACHARY COSGROVE)

Petitioner.)
_____))

Case No.: 8002014009262

OAH No.: 2015070112

**ORDER OF NON-ADOPTION
OF PROPOSED DECISION**

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. A panel of the Medical Board of California (Board) will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit directed to the question of whether the proposed order should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Kennedy Court Reporters, 920 West 17th Street, 2nd Floor, Santa Ana, CA 92706. The telephone number is (800) 231-2682.


To order a copy of the exhibits, please submit a written request to this Board.

In addition, oral argument will only be scheduled if a party files a request for oral argument with the Board within 20 days from the date of this notice. If a timely request is filed, the Board will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed order should be modified. Please do not attach to your written argument or any documents that are not part of the record as they cannot be considered by the Panel. The Board directs the parties' attention to Title 16 of the California Code of Regulations, sections 1364.30 and 1364.32 for additional requirements regarding the submission of oral and written argument.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Board. The mailing address of the Board is as follows:

MEDICAL BOARD OF CALIFORNIA
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815-3831
(916) 263-6668
Attention: Michelle Solario

Date: November 12, 2015



Jamie Wright, J.D.
Chair, Panel A

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ZACHARY COSGROVE,

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PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on August 31, 2015, in Los Angeles, California.

Edward O. Lear, Attorney at Law, represented petitioner Zachary Cosgrove.

Robert McKim Bell, Supervising Deputy Attorney General, appeared under Government Code section 11522.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 31, 2015.

FACTUAL FINDINGS

1. Petitioner filed a Petition for Penalty Relief, Reinstatement of Revoked/Suspended Certificate, on October 1, 2014 (2014 Petition).

2. The Medical Board (Board) issued Physician and Surgeon's Certificate Number A 70710 to petitioner on January 21, 2000. Petitioner obtained his medical degree from Ross University School of Medicine in the Commonwealth of Dominica, West Indies, in 1997. After completing his residency in family practice at Kern County Medical Center in 2001 and being board certified, petitioner worked at a community health clinic in Bakersfield, California.

3. On April 23, 2007, the Board's Executive Director filed an Accusation against respondent. The Accusation alleged that, beginning in July 2002, the year after petitioner began his practice at the clinic, through March 2006, petitioner had sexual relationships with three of his patients. When the first patient threatened to report petitioner to his employer, he physically assaulted her. He physically assaulted the second patient as well. When the third patient reported

petitioner to his clinic, petitioner threatened her. He was convicted of a misdemeanor violation of Penal Code section 136.1, subdivision (a)(1) (dissuading a witness); the conviction has been expunged. The Accusation included causes for discipline involving petitioner's sexual misconduct with or abuse of the three patients, unprofessional conduct/gross negligence, repeated negligent acts, unprofessional conduct/incompetence, conviction of a substantially related crime, and a statutory drug violation.¹

4. The Board revoked petitioner's certificate by a Decision, effective February 19, 2008, adopting petitioner's Stipulation for Surrender of License (Stipulation). The Stipulation provides that "Respondent agrees that if he ever applies for re-licensure or petitions for reinstatement as a physician and surgeon in California all of the charges and allegations contained in Accusation number 08-2006-175288 shall be deemed true, correct, and fully admitted by respondent for purposes of that proceeding or any other licensing proceeding involving Respondent in the state of California." (Ex. 3.)

5. On March 30, 2011, petitioner signed a Petition for Penalty Relief, Reinstatement of Revoked Certificate (2011 Petition), which he filed with the Board. Effective August 17, 2012, the Board adopted as the Decision and Order of the Board a Proposed Decision issued by Administrative Law Judge Ruth S. Astle on July 5, 2012, denying the 2011 Petition. The Decision and Order concludes that "petitioner has not fully demonstrated good cause to grant his petition for penalty relief – reinstatement of revoked certificate under Business and Professions Code section 2307 and Government Code section 11522, in that he has not fully demonstrated that he is safe to practice medicine." (Ex. 4.) The Decision and Order recites the following findings:

3. Petitioner moved from California to Texas about the same time as his certificate was surrendered. He has been employed in various capacities including as a sales consultant for Advent Resource Management. This job was paid by commission only and petitioner was not successful. However, his employer testified at the hearing that petitioner was a good employee and that he trusts him.

4. Petitioner has been participating in individual counseling since August 2010. His counselor wrote a letter dated January 31, 2011, stating that petitioner has been honest about his problems in his sessions with her, including his problems with substance abuse. Petitioner does not submit a report from a psychiatrist stating whether or not he is safe to practice medicine.

¹ When petitioner was arrested for his actions involving his third patient, investigators found a marijuana pipe in his home.

5. It has been over four years since petitioner surrendered his certificate. He has attended numerous continuing education programs. He also attended a Profession Renewal in Medicine through Ethics Course. He successfully completed this course November 21, 2010.

6. Petitioner expresses remorse for his actions that resulted in the loss of his certificate. *However, he has not presented any evidence that he has undergone a psychiatric evaluation that would address his substance abuse in the past. He has not undergone an evaluation of whether or not he is competent to practice or safe to practice.*

7. Petitioner presented many letters of recommendation, including one from Carlos Alvarez, M.D., Medical Director of Valley Medical Group of Kern Internal Medicine; and a number of letters from community members, including two from church pastors. They are aware of the circumstances of petitioner's loss of his medical certificate, but short on details. They support petitioner's reinstatement.

8. Petitioner's wife testified at the hearing. She stated that she and petitioner were going through a bad time in their marriage. They were living together, but separated. She got involved with drugs and went through rehabilitation to save their family. She believes things have changed and wants her husband's certificate to be reinstated.

Petitioner's friend and colleague Michael Komin, M.D. testified at the hearing. He is willing to open a clinic for petitioner and supervise him. He has seen a change in petitioner. He finds petitioner to be more humble.

Petitioner's father-in-law testified at the hearing. He is a physician in Kansas. Petitioner shadowed him in his practice. He has noticed a positive change in petitioner and believes petitioner can be a caring physician.

A close family friend testified at the hearing. Petitioner worked on and off for his company from 2007 to 2010. Petitioner was a good employee.

Another friend of the family testified at the hearing. He knows petitioner through petitioner's wife. Their families socialize. Petitioner is easy to be around. He is a good guy and a kind and gentle person.

Petitioner's 18 year old son testified at the hearing. His father is teaching him the difference between right and wrong.

9. Petitioner wants to reinstate his certificate so that he can practice medicine in California. He is willing to come to California if he is reinstated.

10. Petitioner has made significant and sincere efforts toward rehabilitation. However, there are some deficiencies that must be addressed before reinstatement. *Petitioner needs to be evaluated concerning his alcohol and drug use, his mental and emotional health, and his present competence to practice medicine. Without further information, it would not be in the public interest to reinstate petitioner's certificate at this time.* (Ex. 4, italics added.)

6. Petitioner has not overcome the evidentiary deficiencies for which the Board denied his 2011 Petition. Those deficiencies must now be expanded to apply to petitioner's newly-disclosed crystal methamphetamine addiction, as well as to petitioner's failure to disclose the addiction at the hearing on the 2011 Petition.

7. Petitioner testified that, at the hearing on the 2011 Petition, he did not disclose to the Board that he was addicted to crystal methamphetamine when he committed the acts for which his certificate was revoked, because he was ashamed to reveal it. In his 2014 Petition, Petitioner writes that "[a]lthough I believe it explains my inappropriate behavior during those years, nobody ever knew of my amphetamine use during those days and I was never charged with any violations with regard to amphetamine use."

8. Petitioner testified that his methamphetamine use caused him to engage in the misconduct for which his physician's and surgeon's certificate was revoked, and that because he stopped abusing methamphetamine he no longer has boundary issues and will no longer pose a threat to patients. Petitioner maintains that when he committed his offenses he was in a "self-focused state of amphetamine disinhibition and hypersexuality" (Ex. 8, Tab A, p. 2), and that he "has addressed the root problem of his misconduct which was his amphetamine abuse." (Ex. C.)

9. Petitioner's contention, however, is not supported by evidence sufficient to warrant granting his petition. Whether petitioner is safe to practice medicine depends at least in part on whether his prior acts of misconduct, for which his certificate was revoked, were due to petitioner's substance abuse. If they were, the evidence on this record of petitioner's sobriety since

2006 might, in combination with other evidence of rehabilitation, be sufficient to warrant granting the 2014 Petition. But there is no unequivocal evidence to support the argument that petitioner's drug use was a cause, let alone the sole cause, of his improper acts.

10. To support his contention, petitioner offered only a letter from psychiatrist Christopher B. Ticknor, M.D, dated September 15, 2014. Dr. Ticknor did not appear at the hearing. In the letter, Dr. Ticknor wrote that he has seen petitioner once per month since conducting an initial two-hour evaluation of petitioner on April 15, 2013.² Petitioner testified that he visits Dr. Ticknor for 15 to 30 minutes, once per month.

11. In his letter, Dr. Ticknor wrote that he examined, among other things, records of petitioner's drug test results, which were negative, and a summary of psychological care provided to petitioner by Sharon Benner, M.Ed., LPC, a psychotherapist in San Antonio, Texas, who treated petitioner from August 2010 through 2011. Dr. Ticknor wrote that the records reflect that petitioner has complied with Benner's treatment recommendations. He concluded that petitioner is not a danger to the public and should be licensed on the condition that he continue to participate in a monitoring program to ensure that he remains alcohol- and drug-free. Dr. Ticknor wrote that, based on his initial review of petitioner, the subsequent monthly visits, and his review of the records, petitioner "is a successfully recovering former addict. . . . There is no reason to believe at this time that drug dependency is an active problem" for petitioner. (Ex. 8, Tab C.)

12. As to the issue of whether petitioner's drug abuse was the cause of petitioner's misconduct, however, Dr. Ticknor does not provide a clear answer. Dr. Ticknor opined that petitioner "has become fully aware of the necessity of observing professional boundaries," based on petitioner's attendance at ethics programs and conferences, letters of support, and successful participation in counseling therapy about his boundary violations. (Ex. 8, Tab C.) This appears to imply that the lessons about professional boundaries are the result of a deficiency in ethics training, and were addressed in ethics courses and in therapy, and were not the result of methamphetamine use.

13. Dr. Ticknor did not in his letter profess to be knowledgeable about the effects of methamphetamine use on a medical professional's boundary violations. Instead, he wrote that petitioner provided him with several articles on cocaine and methamphetamine addiction and with a chapter, from an unstated source, on certain drugs and sex and the disinhibiting effect of stimulants on drug abusers. Although Dr. Ticknor wrote that petitioner "understands the relationship between his drug abuse history and his taking advantage of several patients in his medical care," he also wrote that petitioner "understands that *independently* and together, under no

² This letter was admitted under Government Code section 11513, subdivision (d), relating to hearsay evidence. It may be used to supplement or explain other admissible evidence; it may not be used, by itself, to support a finding of fact where, as here, an objection was timely made.

circumstances can he relapse in *either area*.” (Ex. 8, Tab C, italics added.) This language is at best ambiguous about whether methamphetamine abuse caused, or was even a contributing cause of, petitioner’s misconduct. Indeed, Dr. Ticknor’s letter might reasonably be read to indicate that petitioner’s misconduct had causes independent of his methamphetamine abuse.

14. Petitioner’s own non-expert testimony about the cause of his misconduct, supported only by Dr. Ticknor’s ambiguous opinions and conclusions, does not establish that petitioner has met his burden by clear and convincing evidence.

15. As at the hearing on the 2011 Petition, petitioner testified that he is remorseful about his misconduct. Testifying again for petitioner were Dr. Komin and petitioner’s father-in-law; also testifying were petitioner’s friend, Kelly Scherbenske, CRNA, and petitioner’s brother, Daniel Cosgrove, M.D. Petitioner again submitted numerous reference letters attesting to his character. Other letters and documentary evidence establish petitioner’s completion of medical ethics courses, courses on professional boundaries, and other continuing medical education courses, compliance with drug testing and negative test results, and participation in Narcotics Anonymous. The evidence petitioner has submitted to demonstrate that he has not used methamphetamine since December 7, 2006, nearly nine years ago, is persuasive.

LEGAL CONCLUSIONS

1. A person whose certificate has been revoked may petition the Board for reinstatement. “The petition shall state any facts as may be required by the board. The petition shall be accompanied by at least two verified recommendations from physicians and surgeons certificated in any state who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed.” (Bus. & Prof. Code, § 2307, subd. (c).)

2. The administrative law judge hearing the petition “may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner’s activities during the time the certificate was in good standing, and the petitioner’s rehabilitative efforts, general reputation for truth, and professional ability.” (Bus. & Prof. Code, § 2307, subd. (e).) The administrative law judge may recommend reinstating a certificate and imposing probationary terms and conditions. (Bus. & Prof. Code, § 2307, subd. (f).)

In a proceeding to reinstate a revoked certificate, the burden rests on the petitioner to prove that he has rehabilitated himself and that he is entitled to have his certificate restored. (*Flanzer v. Bd. of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.) A person seeking reinstatement must present strong proof of rehabilitation and a sufficient showing of rehabilitation to overcome the Board’s former adverse determination. (*Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1092-1093.) The standard of proof is clear and convincing evidence to a reasonable certainty. (*Id.*; *Housman v. Bd. of Medical Examiners* (1948) 84 Cal.App.2d 308.)

3. Protection of the public “shall be the highest priority” for the Board and administrative law judges in exercising their disciplinary authority. (Bus. & Prof. Code, § 2229.) An administrative law judge “shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence.” (Bus. & Prof. Code, § 2229, subd. (b).) “Where rehabilitation and protection are inconsistent, protection shall be paramount.” (Bus. & Prof. Code, § 2229, subd. (c).)

4. Cause does not exist under Business and Professions Code section 2307 to grant petitioner’s request for reinstatement of his certificate, based on Factual Findings 1 through 15.

5. Petitioner failed to make the required showing of rehabilitation. Although petitioner submitted a good deal of evidence to show that he has been drug-free since 2006, he did not provide competent medical or psychiatric evidence showing that his methamphetamine use caused the behavior that led to the revocation of his certificate, and that absent such drug use there are no triggers likely to occasion similar misconduct. Nor did petitioner’s evidence adequately address petitioner’s failure to disclose his methamphetamine use to the Board until very recently. He did not disclose it when he last petitioned for reinstatement in 2011, or indeed, at any time from 2002 through the filing of the 2014 Petition. The evidence on the record as a whole fails to demonstrate, by clear and convincing evidence, that petitioner is safe to practice medicine.

ORDER

The petition of Zachary Cosgrove for reinstatement of his physician’s and surgeon’s certificate is denied.

DATED: September 30, 2015

DocuSigned by:

Howard W. Cohen

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HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings